District Council of Iron Workers of the State of California and Vicinity *and* Madison Industries, a California Corporation *and* Sheet Metal Workers' International Association, Local Union No. 162. Case 21–CD–601

April 30, 1992

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

The charge in this Section 10(k) proceeding was filed October 16, 1991,[1] by the Employer, Madison Industries, a California Corporation, alleging that the Respondent, District Council of Iron Workers of the State of California and Vicinity (Iron Workers), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Sheet Metal Workers' International Association, Local Union No. 162 (Sheet Metal Workers Local 162). The hearing was held December 5 before Hearing Officer John J. Hatem.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, a California corporation with its office and principal place of business in Los Angeles, California, is engaged in the fabrication and installation of metal structures for commercial customers. In the 12 months prior to the hearing, it purchased and caused to be delivered to its Los Angeles facility goods and materials valued in excess of $50,000, directly from enterprises located outside the State of California. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Sheet Metal Workers Local 162 and the Iron Workers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

The Employer is one of six wholly owned subsidiaries of its parent company, John S. Frey Enterprises, a California corporation (Parent Company). The three officers of the Parent Company are also officers of each of the subsidiaries. The day-to-day operations of each subsidiary are independently controlled by that subsidiary's general manager/vice president (general manager), who is hired by the Parent Company.

The Employer performs field construction work in California and Hawaii. Prior to June 30, 1986, the Employer had a collective-bargaining agreement with Sheet Metal Workers' International Association Local Union No. 108 (Sheet Metal Workers Local 108). The Employer also has a history of collective-bargaining agreements with the Iron Workers. In or about March 1990, Sheet Metal Workers Local 108 was involved in a labor dispute with the Employer and pulled its members off the Employer's jobsites. Shortly thereafter, on March 15, 1990, the Employer entered into a collective-bargaining agreement with the Iron Workers to cover the work abandoned by Sheet Metal Workers Local 108. This agreement is effective through June 30, 1992.

One of the Parent Company's other subsidiaries, Madison Industries, an Arizona corporation (Madison Arizona), has a collective-bargaining agreement with another Sheet Metal Workers local, Sheet Metal Workers' International Association Local Union No. 359 (Sheet Metal Workers Local 359).

In or about May or June 1990, Don Whipple, business representative for Sheet Metal Workers Local 162, telephoned John Frey Jr. (Frey), the Employer's general manager, and told him that he had witnessed the Employer's crews erecting a service station in the Sacramento area, that he felt such work belonged to his union, and that he would like the Employer to employ members of Sheet Metal Workers Local 162 on such jobs in the area. Frey told Whipple that charges had been filed against the Employer by Sheet Metal Workers Local 108, and that he did not care to discuss anything with him until those charges were resolved. Whipple called Frey again in or about February or March and repeated his request for assignment of the service station work. Frey again refused to discuss Whipple's request. In June, Whipple called Frey again regarding the service station work and suggested that the Employer was contractually obligated to reassign the work to Sheet Metal Workers Local 162, stating ''You're Madison Arizona, and you have an agreement.'' Frey responded that he had nothing to do with Madison Arizona and their labor agreements.

By letter dated June 5, Sheet Metal Workers Local 162 filed a grievance against Madison Arizona with the Sacramento Valley Sheet Metal Joint Adjustment Board (Joint Adjustment Board). By letter dated June 12, Madison Arizona requested that the hearing concerning the grievance be canceled. The letter stated that the Joint Adjustment Board does not have jurisdiction to decide grievances filed by Sheet Metal Workers Local 162 against Madison Arizona because Madison

[1] All dates are in 1991 unless otherwise indicated.

Arizona does not have a collective-bargaining agreement with Sheet Metal Workers Local 162 and because Madison Arizona had not subcontracted or assigned any work in California. On June 17 the Joint Adjustment Board held a hearing concerning the grievance. Neither the Employer nor Madison Arizona were represented at the hearing. The Joint Adjustment Board determined that the Employer and Madison Arizona ''are one in the same entity,'' and accordingly directed ''Madison Industries'' to pay $60,000 to the Local 162 training fund.[2]

By letter dated September 17, Robert Jesinger, Sheet Metal Workers Local 162's attorney, wrote to ''John Frey'' at Madison Arizona.[3] Jesinger stated that Sheet Metal Workers Local 162 would file a lawsuit if ''Madison Industries'' did not comply with the decision of the Joint Adjustment Board. Madison Arizona sent a copy of this letter to Frey.

Also in September, Frey had a conversation with Iron Workers Business Representative Sven Sorensen about the Employer's work in the Sacramento area. Specifically, Frey told Sorensen that the Sheet Metal Workers were claiming this work, that the Employer was feeling pressure to use employees represented by Sheet Metal Workers Local 162, and that the Employer might in fact have to use those employees. Sorensen reminded Frey that the Employer had a collective-bargaining agreement with the Iron Workers covering the Employer's service station work in Sacramento. Sorensen further stated that the Iron Workers might consider picketing the Employer's jobs or taking other action to prevent the reassignment of the work. A few days later, Frey received a call from Iron Workers President Zampa and had essentially the same conversation with him that he had had with Sorensen. Zampa told Frey that he expected the Employer to live up to its end of the agreement, and that if the Employer proceeded with its service station work using sheet metal workers, Zampa would pull employees represented by the Iron Workers off the Employer's jobs. By letter dated October 23, Iron Workers Attorney Victor Van Bourg informed Steven Schneider, the Employer's attorney, that if employees represented by the Iron Workers were taken off of the Employer's jobsites, the Iron Workers ''would take every appropriate means, legal and otherwise, against the Company.''

[2] The Joint Adjustment Board alternatively directed ''Madison Industries'' to pay $3000 to the Local 162 training fund if, within 30 days, it complied with the Joint Adjustment Board's decision and agreed to employ members of Sheet Metal Workers Local 162 on future station renovations.

[3] John S. Frey is the president of the Parent Company and the six subsidiaries. John S. Frey Jr. (Frey), the Employer's vice president/general manager, is not an officer or an employee of the Parent Company or Madison Arizona.

B. *Work in Dispute*

The work in dispute involves the installation, erection, and renovation of metal service station structures for British Petroleum and other customers in the State of California.[4]

C. *Contentions of the Parties*

The Employer contends that reasonable cause exists to believe that the Iron Workers violated Section 8(b)(4)(D) of the Act and that the work in dispute should be awarded to the employees represented by the Iron Workers. The Employer bases its contention on its collective-bargaining agreement with the Iron Workers, its preference and past practice, relative skills, and economy and efficiency of operations.

The Iron Workers joins in the Employer's contention that the work in dispute should be awarded to employees represented by the Iron Workers.

Sheet Metal Workers Local 162 contends that reasonable cause does not exist to believe that Section 8(b)(4)(D) of the Act has been violated because it has only pursued its contractual remedies and the Iron Workers has not done anything that would constitute a threat within the meaning of Section 8(b)(4)(ii) of the Act. Sheet Metal Workers Local 162 also contends that this matter is now moot because the work in dispute has been completed. Further, Sheet Metal Workers Local 162 contends that if the Employer and Madison Arizona are separate employers, then there are no competing claims for work because it has only claimed work performed by Madison Arizona. Sheet Metal

[4] Sheet Metal Workers Local 162 argues that the record disclosed that it has claimed only the work performed at four service stations in Sacramento, California, and thus the work in dispute involves only the work performed by the Employer at these four service stations. The Iron Workers argues that the work in dispute involves work performed in all areas of the Iron Workers' jurisdiction, which is in California and Nevada. The Employer argues that the description of work as set forth in the notice of hearing, and which is also set forth above, most accurately describes the work in dispute. The Employer performs its work in California and Hawaii. Although Sheet Metal Workers Local 162 has claimed only the work at four service stations, it does not disclaim interest in any future work performed by the Employer. Further, we note that the basis for its claim, i.e., that the Employer and Madison Arizona are a single employer, is one that could equally serve as a basis for any other service station work performed by the Employer. The Iron Workers, based on its collective-bargaining agreement, claims all of the service station work performed by the Employer in California and Nevada. Therefore, as the Iron Workers' collective-bargaining agreement and the single employer contention of Sheet Metal Workers Local 162 both provide a basis for claiming any of the Employer's service station work performed in California, and as neither labor organization has disclaimed any of the Employer's service station work, we find that the description of work that is set forth above, and in the notice of hearing, is the most accurate description of the work in dispute.

Member Oviatt would limit the Order in this case to the four California service stations. He finds no adequate predicate for a broad award on the facts of this case.

Workers Local 162 alternatively argues that, on the merits of the dispute, the factors of collective-bargaining agreements, employer preference and past practice, area and industry practice, and economy and efficiency of operations favor the award of this work to employees represented by Sheet Metal Workers Local 162.

The parties have stipulated that they have not agreed on a method for the voluntary adjustment of the dispute.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe Section 8(b)(4)(D) of the Act has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute. As discussed above, Business Representative Sorensen told Frey that the Iron Workers might consider picketing the Employer's jobsites to prevent the reassignment of the Employer's work; Iron Workers President Zampa told Frey he would pull employees represented by the Iron Workers off the Employer's jobs if any work was reassigned to employees represented by the Sheet Metal Workers; and Iron Workers Attorney Van Bourg stated to the Employer's attorney that if any work was assigned to employees represented by the Sheet Metal Workers, the Iron Workers would ''take every appropriate means, legal and otherwise, against the Company.'' We find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that, as stipulated, there exists no agreed-upon method of voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.[5]

[5] We deny Sheet Metal Workers Local 162's motion to quash the notice of hearing. We reject its argument that no jurisdictional dispute exists because the work at the four service stations has been completed. The mere fact that disputed work has been completed does not render a jurisdictional dispute moot where nothing indicates that similar disputes are unlikely to recur. *Operating Engineers Local 150 (Martin Cement)*, 284 NLRB 858, 860 fn. 4 (1987). As discussed above, the work in dispute involves work throughout the State of California and neither Sheet Metal Workers Local 162 nor the Iron Workers have disclaimed interest in any of this work in the future. Further, we reject the argument made by Sheet Metal Workers Local 162 that no competing claims for work exist because it has made no claim against the Employer, but rather only against Madison Arizona. This argument has no merit because Sheet Metal Workers Local 162 has in fact made a competing claim for the work in dispute, has based its claim on its contention that the Employer and Madison Arizona are a single employer, and has not disclaimed interest in any of the work in dispute, or in any such work in the future.

Member Oviatt agrees that a dispute is not rendered moot by completion of the work and that there were competing claims to the work.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making a determination of the dispute.

1. Collective-bargaining agreements

The Employer has had a history of collective-bargaining agreements with the Iron Workers. The Employer's most recent collective-bargaining agreement with the Iron Workers, entered into on March 15, 1990, is effective through June 30, 1992. The agreement covers all work in connection with field fabrication and/or erection of structural, ornamental, and reinforcing steel work.

The Employer does not have, and has never had, a collective-bargaining agreement with Sheet Metal Workers Local 162. The Employer has had collective-bargaining agreements with Sheet Metal Workers Local 108. Its most recent agreement with Sheet Metal Workers Local 108 terminated June 30, 1986.

The basis for Sheet Metal Workers Local 162's claim to the work in dispute derives from a collective-bargaining agreement between Madison Arizona and Sheet Metal Workers Local 359. Sheet Metal Workers Local 162, relying on *McKinstry Co. v. Sheet Metal Workers Local 16*, 859 F.2d 1382 (9th Cir. 1988), argues that the agreement between Madison Arizona and Sheet Metal Workers Local 359 both has extraterritorial effects, extending to work performed by Madison Arizona in the jurisdiction of Local 162, and confers benefits that may be enforced by a sister local such as Local 162 against Madison Arizona. Local 162 further argues that Madison Arizona and Madison California (the Employer) are one and the same entity, so that work performed by the latter comes within the agreement. We do not pass on the validity of the contractual construction that underlies this theory, but find that the agreement is not relevant to the instant dispute because, for the reasons set forth below, the Employer and Madison Arizona are separate employers and entities.

Single-employer status is determined by examining whether the entities have common ownership or common financial control, common management, interrelation of operations, and centralized control of labor relations. *Radio Union Local 1264 v. Broadcast Service*, 380 U.S. 255 (1965). Although the Employer and Madison Arizona are commonly owned by the Parent

Company, they possess none of the other indicia of single-employer status. The Employer's day-to-day operations are independently controlled by Frey, the Employer's general manager, and Madison Arizona's day-to-day operations are independently controlled by its general manager, John Sentell Jr. Each general manager has independent and exclusive financial control over his respective operations, and each general manager independently exercises exclusive control over his respective company's labor relations. The salaries of the general managers are paid by their respective subsidiaries. The Parent Company does not interfere with, or exercise any control over, the financial operations or labor relations of either the Employer or Madison Arizona.

Additionally, there is no interrelation of operations between the Employer and Madison Arizona. They each separately bid for, and invoice, their work for their customers, and the limited dealings they have with each other are at arm's length. Although the two companies have purchased items from each other, the purchases are paid for by the purchasing company, and the price, which includes a profit to the selling company, is set in arm's-length negotiations.

We conclude that, as the Employer and Madison Arizona do not have common financial control, common management, interrelation of operations, or centralized control of labor relations, they do not constitute a single employer. Consequently, Madison Arizona's collective-bargaining agreement with Sheet Metal Workers Local 359 is not a determining factor in this jurisdictional dispute. We find, however, that, as the Employer and the Iron Workers do have a collective-bargaining agreement covering the work in dispute, the factor of collective-bargaining agreements favors an award to employees represented by the Iron Workers.

2. Employer preference and past practice

Prior to March 1990, the Employer performed its field construction work with 50 percent of its employees represented by Sheet Metal Workers Local 108, and 50 percent of its employees represented by the Iron Workers. Since March 1990, the Employer has performed this work exclusively with employees represented by the Iron Workers. Frey testified that the Employer prefers to assign the work in dispute to employees represented by the Iron Workers. We find that the factor of employer preference and past practice favors an award to employees represented by the Iron Workers.

3. Area and industry practice

Sheet Metal Workers Local 162 Business Representative Whipple testified that companies he has observed perform service station construction and renovation work using crews consisting half of employees represented by the Sheet Metal Workers and half of employees represented by the Iron Workers. He testified that there was a natural division in the type of work performed on these mixed crews, and that the employees represented by the Iron Workers were the lead persons ''setting up any and all of the structural members'' and employees represented by the Sheet Metal Workers were the lead persons ''towards the finish of the product.'' Whipple also testified that a nonunion company in the area, Beamon Corporation, uses composite crews consisting of nonunion sheet metal workers and nonunion ironworkers.

Clemente Cobo, business agent for Sheet Metal Workers Local 108, testified that two of the Employer's competitors, Bryce Parker, Inc. and Besteel Industries, Inc., use composite crews consisting of employees represented by the Sheet Metal Workers and employees represented by the Iron Workers. We find that the factor of area and industry practice does not favor either an award to employees represented by the Iron Workers or an award to employees represented by Sheet Metal Workers Local 162.

4. Relative skills

Frey, the Employer's general manager, testified that the primary skills of employees represented by the Iron Workers are rigging and erection of steel structures of the kind involved in the work in dispute and are the ''forte'' of employees represented by the Iron Workers rather than that of employees represented by the Sheet Metal Workers. Frey further testified that rigging and moving of steel structures at service stations involves working with a structure that weighs approximately 40,000 pounds, and that a skilled rigging process is necessary to ensure the safety of employees on the site. Madison Arizona General Manager Sentell testified that the Iron Workers' apprenticeship program taught employees represented by the Iron Workers how to safely perform rigging.

As noted above, prior to March 1990, the Employer used composite crews for the work of the kind in dispute, and there was a natural division of the type of work performed by these crews. The Employer provided training for employees represented by Sheet Metal Workers Local 108 for the type of work that they did on these projects. Since March 1990, the Employer has performed this work exclusively with employees represented by the Iron Workers and has trained these employees to do the work previously performed by the employees represented by Sheet Metal Workers Local 108. There is no evidence as to whether employees represented by Sheet Metal Workers Local 162 have been trained to safely rig and move steel structures. We find that the factor of relative skills favors an award of the disputed work to employees represented by the Iron Workers.

5. Economy and efficiency of operations

Frey testified that employees represented by the Sheet Metal Workers have never performed more than one half of the Employer's field construction work in the State of California, while employees represented by the Iron Workers have performed all the Employer's field construction work in the State of California since March 1990. Frey further testified that he did not think that the skills and abilities of employees represented by the Sheet Metal Workers would bring more efficiency to the Employer's field and shop work. We find that Frey's testimony is little more than a reiteration of the Employer's preference. To the extent it focuses on ability to do the whole job, it focuses on evidence we have already considered under the relative skills factor. Consequently, the factor of economy and efficiency of operations favors an award of the disputed work to neither group of employees.

Conclusion

After considering all the relevant factors, we conclude that employees represented by the Iron Workers are entitled to perform the work in dispute. We reach this conclusion relying on the Iron Workers' collective-bargaining agreement, employer preference and past practice, and relative skills. In making this determination, we are awarding the work to employees represented by the Iron Workers, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Madison Industries, a California Corporation, represented by District Council of Iron Workers of the State of California and Vicinity, are entitled to perform the installation, erection, and renovation of metal service station structures for British Petroleum and other customers in the State of California.